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IN THE

Supreme Court of the United States

October Term, 1963

No. 362

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, a Corporation, *et al.*,
Petitioners,

v.

WEBB'S CITY, INC., a Corporation.

REPLY BRIEF FOR PETITIONERS

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Argument

1. Respondent asserts that a procedure for review by the Supreme Court of Florida was available to petitioners and thus the judgment below was not final since it was not rendered by the highest court of the state in which a judgment could be had. Petitioners persist in their original contention that the judgment below is a final judgment within the meaning of Title 28, United States Code, Section 1257, since it was not reviewable by the Supreme Court of Florida.

The Florida Constitution, Article V, Sec. 4(2) and the Florida Appellate Rules #2.1a5(b) set forth the jurisdictional bases in question:

> *Appeals* from district courts of appeal may be taken to the Supreme Court, as a matter of right, only from decisions [1] initially passing upon the validity of a state statute, a federal statute or treaty, or [2] initially construing a controlling provision of

> the Florida or federal Constitution. The Supreme Court may review by *certiorari* any decision of a district court of appeal that [1] affects a class of constitutional or state officers, or that [2] passes upon a question certified by the district court of appeal to be of great public interest, or that [3] is in direct conflict with a decision of another district court of appeal or of the Supreme Court on the same point of law, and may issue writs of certiorari to commissions established by law (numerals and emphasis supplied).

Appeal grounds numbered 1 and 2 and certiorari ground numbered 1, are clearly irrelevant as the district court of appeal did not pass upon the validity of any state statute, federal statute, or federal treaty, initially or otherwise; nor did that court construe any controlling constitutional provision, initially or otherwise;[1] nor does any aspect of the case involve or affect any class of constitutional or state officers. While not disputing the irrelevance of these provisions, respondent contends that certiorari review could have been sought in the Supreme Court of Florida because (certiorari ground numbered 2) a question could have been certified by the district court of appeal to be of great public interest, and because (according to footnote 9 on page 13 of respondent's brief) there is a direct conflict between the appellate decision and one of the Supreme Court of Florida.

Analysis of the case law will show that certiorari ground numbered 2 is inapplicable since it is the function, responsibility, and privilege of the district court of appeal alone, to certify a question to be of great public interest so that the Florida Supreme Court may in its discretion grant certiorari. In *Susco Car Rental System of Fla.* v. *Leonard*, 112 So. 2d 832 (Fla. 1959), the Florida Supreme Court held that the appeal court's determination that a certified ques-

[1] The Supreme Court of Florida in refusing a direct appeal from the trial court in effect held that no construction of a constitutional provision as distinguished from application thereof was involved.

tion of great public interest exists is conclusive and that "[a] negative decision by the district court in the exercise of its discretion in a given case would certainly present no basis for review . . ." (at 834). And in *United States* v. *Dahlberg*, 120 So. 2d 585 (Fla. 1960), the court quashed an appeal by the United States in an estate matter on the ground, *inter alia*, that only the appellate court can certify a question for certiorari review:

> . . . the government says the case is clearly reviewable by certiorari because it presents a question of great public interest. The answer to this contention is that this is an appeal and not certiorari, and even if it were certiorari, the district court did not certify it to us as required by the Constitution and rules (at 585-586).

Thus, the law seems clear that the appeal court alone has power to certify a question and thus afford a basis for invocation of the Florida Supreme Court's certiorari jurisdiction on ground numbered 2.

Respondent contends that petitioners had the duty to seek certification in the District Court of Appeal, and that the certification is "usually" so initiated (p. 9, Respondent's brief). Such duty finds no support in any Florida law. On the contrary, the appellate courts assiduously guard *their* sole prerogatives in this field. In *Whitaker* v. *Jacksonville Expressway Authority*, 131 So. 2d 22 (Fla. App., 1961), the appeal court refused to recognize a "motion" to certify its decision as one passing upon a question of great public interest so as to provide a basis for certiorari review by the Florida Supreme Court, which "motion" was made by the appellant:

> Since the right of review does not lie from a failure or refusal of a District Court of Appeal to certify any decision rendered by it as one that passes upon a question of great public interest, a pleading of the character under discussion is not a motion . . . [but merely a suggestion] . . . such pleading has no legal effect (at 24).

The court held that:

> . . . a party litigant is not entitled as a matter of right to have any order entered by this court disposing of any pleading the purpose of which is to cast on this court the duty to certify one of its decisions as one which passes upon a question of great public interest . . . no formal order is necessary to dispose of such suggestion . . . any certificate by the court to the effect that a decision passes upon a question of great public interest *shall in all cases be upon the court's own motion* (at 24, emphasis added).

In the *Whitaker* case, the appellate court explicitly ruled that it will determine the certification issue itself and that counsel need not bring such issue to the court's attention since counsel's "suggestion", though not unwelcome, is unnecessary:

> Inherent in every decision rendered by a District Court of Appeal is the implication, unless otherwise stated or contrary action taken, that it *does not* pass upon a question of great public interest . . . (at 23).

Respondent cites *Fisher* v. *Perkins (Fisher* v. *Carrico)*, 122 U. S. 522 (1887). In the *Fisher* case, however, state law required the losing party in the superior court to make an application for permission to appeal on any ground; when the amount was under $1,000 and there was no dissenting opinion, the application would not be allowed without a certificate by two judges of the superior court that the question was novel and of sufficient importance to permit an appeal to the Kentucky Court of Appeals. Once the losing party secured such certificate, the superior court had as much duty to allow the appeal upon application as in other appeal applications; if the superior court denied such application, the United States Supreme Court's certiorari jurisdiction could be invoked. In other words, Kentucky *required* the losing party to initiate certiorari review in the

highest state court of a certified important question whereas Florida *denies* the losing party such right by placing such right and duty upon the appeal court and that court only.

Certiorari ground numbered 3 was also unavailable to petitioners. Respondent (footnote 9) states that petitioners "appear to contend" on page 12 of the Petition that *International Ladies Garment Workers Union, Local Chapter No. 415* v. *Sherry Manufacturers Co.*, 115 So. 2d 27 (Fla. App., 1959), cert. den. 119 So. 2d 293 (Fla. 1960) "is in conflict" with the decision of the Florida District Court of Appeal herein. It is true that petitioners contend that the appellate court (not the Supreme Court of Florida as respondent mistakenly asserts) in the *Sherry* case upheld peaceful picketing; but the two decisions involved are obviously not "in direct conflict . . . on the same point of law", as required by certiorari ground numbered 3, since the appellate court in the case at bar specifically distinguished picketing to protest racial discrimination from previous cases involving picketing by unions:

> Is a boycott promoted by picketing to advance the interest of a particular racial or social group, other than labor organization or professional association, valid? This is a racial or social question and the laws applicable to labor disputes have no application here (at 152 So. 2d 179, 182; Petitioners' main brief, appendix p. 7a; emphasis omitted).

Petitioners submit that the above discussion leaves no doubt that the Florida District Court of Appeal had *final appellate jurisdiction* of the case at bar under Article V, Sec. 5(3) of the Florida Constitution (providing for appeals to the appeal court where, as here, no direct appeal from the trial court to the Florida Supreme Court is permitted). As stated in *Karlin* v. *City of Miami Beach, Fla.*, 113 So. 2d 551 (Fla. 1959), the district courts of appeal are "in substantial measure *final appellate courts of last resort* except only in the limited area in which this court

[the Florida Supreme Court] has been endowed with the power to review by appeal or certiorari" (at 552, emphasis supplied). See also 5 Fla. Jur., *Certiorari, new* sec. 6.1 (1962 Supp., p. 42).

The Florida Supreme Court is now restricted to the appeal and certiorari jurisdiction set forth in the Florida Constitution and Florida Appellate Rules, *supra*. The entire purpose of the revised Florida jurisdictional law is to render the district courts of appeal the highest courts of the state except in the specified instances which are not applicable in the case at bar. *Ansin* v. *Thurston*, 101 So. 2d 808, 810 (Fla. 1958) explicitly describes such purpose and result:

> We have heretofore pointed out that under the constitutional plan the powers of this court to review decisions of the district courts of appeal are limited and strictly prescribed . . . It was never intended that the district courts of appeal should be intermediate courts. The revision and modernization of the Florida judicial system at the appellate level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice. The new article embodies throughout its terms the idea of a Supreme Court which functions as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, *with review by the district courts in most instances being final and absolute.*
>
> To fail to recognize that these are courts primarily of *final appellate jurisdiction* and to allow such courts to become intermediate courts of appeal would result in a condition far more detrimental to the general welfare and the speedy and efficient administration of justice than that which the system was designed to remedy.

As relevant Florida state law deems the Florida district court of appeal the highest court in the state capable of rendering a decision in the case at bar, this Court has jurisdiction to review said decision under Title 28, United States Code, sec. 1257(3), petitioners having asserted in the courts below privileges and immunities under the Constitution and laws of the United States.

2. Respondent also asserts that petitioners raise only a factual question and that this Court should not undertake to review the findings of fact of the court below. However, this Court has in the past made its own evaluation of the facts where they have been conclusive to a constitutional adjudication. *Blackburn* v. *Alabama*, 361 U. S. 199; *Spano* v. *New York*, 360 U. S. 315; *Napue* v. *Illinois*, 360 U. S. 264; *Muir* v. *Louisville Park Theatrical Association*, 102 F. Supp. 525 (W. D. Ky. 1951), aff'd 202 F. 2d 275 (6th Cir. 1953), vacated and remanded, 344 U. S. 971; *Niemotko* v. *Maryland*, 340 U. S. 268, 271; *Feiner* v. *New York*, 340 U. S. 315, 316, 322, fn. 4; *Watts* v. *Indiana*, 338 U. S. 49, 50-51; *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 659; *Pierre* v. *Louisiana*, 306 U. S. 354, 358; *Baltimore & Ohio Railroad Company* v. *United States*, 298 U. S. 349, 372; *Norris* v. *Alabama*, 294 U. S. 587, 589, 590; Ohio Valley *Water Company* v. *Ben Avon Borough*, 253 U. S. 287. Further, the opinion below was not based upon the ruling that the picketing was violent, which would be a factual question, but upon the thesis that the cases protecting peaceful picketing apply only to labor organizations (Petitioners' main brief, Appendix page 7a), and the doctrine that unlawfulness of purpose rendered the picketing unlawful (Petitioners' main brief, Appendix page 7a).

Petitioners seek certiorari in this Court in order to affirm the principle that peaceful picketing to further legitimate group interests is constitutionally protected in the light of *NAACP* v. *Button*, 371 U. S. 415, and other cases cited in petitioners' main brief at pages 7-10. It is submitted that this principle is one of great public importance which should be reviewed by this Court.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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